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No. 84 -

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1984

NEW JERSEY-PHILADELPHIA PRESBYTERY
OF THE BIBLE PRESBYTERIAN CHURCH, *et al.*,
*Petitioners*

*v.*

NEW JERSEY STATE BOARD OF
HIGHER EDUCATION, *et al.*,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

A religious college, established by a church as a ministry thereof, and serving a small discrete religious public, has been held by the court below legally entitled to conduct four years of higher education for adults who choose that college, call itself a "college", advertise and recruit students, and award credits in all the courses it offers but is barred from issuing a bachelor's degree in its name showing earning of those credits and attesting to the religious and moral character of the graduate unless (a) the college will become state-licensed and (b) subject itself to total state regulation.

1. Does the licensing requirement violate rights of the church, the college, its faculty and students violative of the Free Exercise Clause of the First Amendment?

2. Does the imposition of the regulatory scheme, by creating excessive entanglements of government with a church ministry, violate the Establishment Clause of the First Amendment?

## LISTING OF PARTIES

*Petitioners*

*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, Collingswood, New Jersey.

*Shelton College, Cape May, New Jersey.

*Bible Presbyterian Church of Collingswood, Collingswood, New Jersey.

Kevin Wilson.

Brad Gsel.

Kevin Clair Michael.

Curtis Jordan Bashaw.

*Respondents*

New Jersey State Board of Higher Education.

T. Edward Hollander, as Chancellor of New Jersey Department of Higher Education.

Richard C. Breslin, as Assistant Chancellor for Academic Affairs, New Jersey Department of Higher Education.

Amorita Suarez, Director of the Office for Independent Colleges and Universities of the New Jersey Department of Higher Education.

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* In accord with Rule 28.1, New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, Shelton College and Bible Presbyterian Church of Collingswood, New Jersey, state that they are corporations which have no parent companies or subsidiaries (except wholly owned subsidiaries) or affiliates.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LISTING OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| REFERENCES TO OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 7 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES


CASES: Page

*Keyishian v. Board of Regents*, 385 U. S. 589 (1967) ..... 12

*Lemon v. Kurtzman*, 403 U. S. 602 (1971).... 8, 9, 12

*Meek v. Pittenger*, 421 U. S. 349 (1975)..... 8, 9

*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, et al. v. New Jersey State Board of Higher Education, et al.*, 482 F.Supp. 968 (D.N.J. 1980)..... 5

*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, et al. v. New Jersey State Board of Higher Education, et al.*, 654 F.2d 868 (3rd Cir. 1981)..... 5

*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, et al. v. New Jersey State Board of Higher Education, et al.*, 514 F.Supp. 506 (D.N.J. 1981)..... 6

*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church, et al. v. New Jersey State Board of Higher Education, et al.*, Civil No. 79-3341 (D.N.J. July 29, 1983)..... 3, 7

*New Jersey State Board of Education v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982)..... 7

*NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ..... 9

*Roemer v. Board of Public Works*, 426 U.S. 736 (1976) ..... 9

*Tilton v. Richardson*, 403 U.S. 672 (1971) ..... 9

*Walz v. Tax Commission*, 397 U.S. 664 (1970).... 12

TABLE OF AUTHORITIES—*(Continued)*


*CASES:* Page

*Wisconsin v. Yoder*, 406 U.S. 205 (1972)..... 9

*CONSTITUTIONS:*

United States Constitution:

Amendment I..... *passim*

Amendment XIV, Section 1..... *passim*

*STATUTES:*

New Jersey Statutes Annotated 18A:

§3-3..... 2

§3-13..... 2

§3-14..... 2

§3-15..... 2

§68-3..... 2

§68-5..... 2

§68-6..... 2

§68-9..... 2

§68-10..... 2

28 U.S.C. §1254(1)..... 2

42 U.S.C. §1983..... 5

*OTHER AUTHORITIES:*

J. BARZUN, THE AMERICAN UNIVERSITY (1965)..... 10

J. BARZUN, THE HOUSE OF INTELLECT (1959)..... 10

C. BIRD, THE CASE AGAINST COLLEGE (1975)..... 10

TABLE OF AUTHORITIES—*(Continued)*

*OTHER AUTHORITIES:* Page

R. Birnbaum, "Factors Related to University Grade Inflation", *Journal of Higher Education*, Vol. 48, No. 5, September/October, 1977 ..... 10

P. COPPERMAN, THE LITERACY HOAX (1978). 10

E. Craven and K. Becklin, "Student Access and the Quality of Instruction", 32 *Educational Record*, Winter, 1978 ..... 10

Duplass, "Degree Depreciation: A Fait Accompli for the Liberal Arts Degree", *Liberal Education*, Vol. 62, December, 1976 ..... 10

R. Edgerton, "Talent for the 1980's — Social Change and the Redefinition of Bacculaureate Education", *Liberal Education*, 1979 ..... 10

J. Epstein, "Bring Back Elitist Universities", *New York Times Magazine*, February 6, 1977 ..... 10

W. GELLHORN and R. K. GREENWALT, AN INDEPENDENT FORDHAM? A CHOICE FOR CATHOLIC EDUCATION (1968) ..... 9

J. Harris and S. Keller, "Assessment Measures Needed for Competency — Based Higher Education", *Peabody Journal of Education*, July, 1976 ..... 10

L. G. HELLER, THE DEATH OF THE AMERICAN UNIVERSITY (1973) ..... 10

H. Hodgkinson, "Education in 1985: A Future History", *Educational Record*, Spring, 1979 ..... 10

J. KEATS, THE SHEEPSKIN PSYCHOSIS (1965) ..... 10

R. KIRK, DECADENCE AND RENEWAL IN THE HIGHER LEARNING (1979) ..... 10

TABLE OF AUTHORITIES—*(Continued)*

*OTHER AUTHORITIES:* Page

J. KLINE, WHY THE PROFESSOR CAN'T TEACH MATHEMATICS AND THE DILEMMA OF UNIVERSITY EDUCATION (1977) ..... 10

S. O'TOOLE, CONFESSIONS OF AN AMERICAN SCHOLAR (1970) ..... 10

S. Schiefelbein, "Confusion at Hartford: What Makes an 'Educated Man'?", *New York Times Magazine*, April 1, 1978 ..... 10

F. WAGNER, THE END OF EDUCATION (1976) ..... 10

H. Winthrop, "How Much are College Students Learning Today? Issues and Trends in American Education", *Peabody Journal of Education*, January, 1978 ..... 10

P. Zagano, "The Great American Writing Crisis", *The Education Digest*, October, 1977 ..... 11

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NEW JERSEY STATE BOARD OF HIGHER EDUCATION, *et al.*,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on July 17, 1984.

### REFERENCES TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which appears as Appendix A hereto, is unpublished; however, the decision is reported at 740 F.2d 957 (3rd Cir. 1984).

Prior opinions in this matter are as follows: two of the opinions of the U.S. District Court for the District of New Jersey are reported at 482 F.Supp. 968 (D.N.J. 1980) (see Appendix F); and 514 F.Supp. 506 (D.N.J. 1981) (see Appendix D). A third opinion and order of the U.S. District Court for the District of New Jersey are unpublished and appear as Appendix B, hereto. A prior opinion of the U.S. Court of Appeals for the Third Circuit is reported at 654 F.2d 868 (3rd Cir. 1981) (see Appendix E). The opinion of the Supreme Court of New Jersey is reported at 448 A.2d 988, 90 N.J. 470 (1982) (see Appendix C).

## JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Third Circuit on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

U.S. Constitution, Amendment XIV, Sec. 1:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

New Jersey Statutes Annotated:

18A §§3-3, 3-13, 3-14, 3-15, 68-3, 68-5, 68-6, 68-9, 68-10 (see Appendix G).

## STATEMENT OF THE CASE

*A. Statement of Facts.*

The New Jersey-Philadelphia Presbytery is the regional ruling body of a small national denomination, Bible Presbyterian Church. The Church, by religious

requirement, conducts, as one of its educational ministries, Shelton College, for the primary purpose of spreading the Gospel. Shelton offers four years of higher education leading to the Bachelor of Arts degree. Its required core curriculum is principally designed to impart knowledge of the Christian faith. The orientation of the teaching is pervasively Calvinist, and a strict code of religious discipline governs both students and faculty. The source of its students consists principally of members of the Church (or of closely related faiths). Shelton's threefold aim in the conducting of higher education is religious: (a) to act as a principal source of the denomination's seminarians, (b) to be a source of teachers for Christian schools, and (c) to produce graduates who will go into secular occupations as "Christian missionaries". As the district court said in its 1983 opinion herein:

> "There can be no question that Shelton College is a religious institution in all of its phases and activities."

*New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey State Board of Higher Education*, Civil No. 79-3341, Slip Op. at 15 (D.N.J. July 29, 1983) (see Appendix B, p. A-17).

The record shows two reasons why Shelton issues the bachelor's degree: (a) the degree occupies a special place in the Calvinist teachings of Bible Presbyterian Church,[1] (b) the religious ministry, which is Shelton Col-

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1. Testimony herein identified, in Calvinist teaching, four distinct areas of Church interest in higher education: (1) training for the Church's ministry, it being a requirement therefor, (under the Church Constitution, Chapter 13, Section 4) that a minister possess a bachelor's degree, (2) the having of an educated clergy, (3) enabling Church lay members to better carry out their duty as missionaries in society, (4) enabling those persons to enter the professions who have a calling from God to do so.

lege, must cease to exist if, though it may lawfully afford education leading to its degree, it may not award its degree.

Shelton accepts no local, state, or federal funds due to its belief in the strict separation of church and state.

New Jersey statutes require the governmental licensing of all institutions of higher education within the state, the "coordination" of the activities of all such institutions in a state "system" of higher education, and state "governance", "supervision", and "control" of all such institutions. It imposes on all institutions of higher education a comprehensive regulatory scheme embracing every aspect of the institutions' existence.

Due to its belief in church-state separation and, principally, to objection, on religious grounds, to governmental licensing and control of church ministries, the Church (Shelton) refused to become thus licensed and subjected to comprehensive regulation. Following the effort of the State to shut the College down in November, 1979 for its refusal to be licensed, students, parents, a faculty member, the Church, and the Presbytery brought the present action in federal court for injunctive relief alleging violation of the Religion Clauses of the First Amendment. At the conclusion of five years in seven court proceedings it has been ruled that Shelton may call itself a "college", advertise itself as such, recruit students, teach its entire curriculum, award credits in each course, but is forbidden to grant its degree which would certify that the credits have been earned and the individual found morally and religiously fit to graduate.

*B. Course of Proceedings.*

On November 15, 1979, the State Board of Higher Education brought suit in the Superior Court of New Jersey, Chancery Division, for an injunction enjoining Shelton from engaging in educational instruction, providing credits, awards, certificates or degrees for instruction given any individual. The court issued a temporary

restraining order forthwith. On November 19, 1979, petitioners filed in the federal district court an action under 42 U.S.C. §1983, contending that the applicaiton of the New Jersey licensing scheme to Shelton violated their rights to the free exercise of religion, excessively entangled the State in the affairs of a church institution, denied the rights of the faculty freely to teach and of students, as adult individuals, to receive ideas; and denied the College equal protection of the law and property rights without due process of law. They also contended that particular statutes and regulations which the State Board sought to enforce were unconstitutionally vague.

The district court, following an evidentiary hearing, (a) enjoined the State Board from taking any action to prevent Shelton from engaging in any educational, teaching or religious activities or from publicizing or advertising the same, and requiring the Superior Court to modify its injunction to permit such activities, (b) held that the state court action could proceed to a determination of the State Board's statutory power (in relation to Shelton's constitutional claims) or lack of power to grant or deny Shelton the right to award degrees. *New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 482 F. Supp. 968 (D.N.J. 1980) (see Appendix F).

The State Board appealed to the Third Circuit, which affirmed, holding that the district court did not abuse its discretion by enjoining the State Board from imposing a prior restraint on all teaching and advertising by a private college. It also held that Petitioners' likelihood of success in the federal action as to the degree-granting question was not clear since New Jersey had a significant interest in protecting consumers of education and the public which may rely upon the certification of proficiency implicit in a degree. *New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868 (3rd Cir. 1981) (see Appendix E).

The state court action then proceeded to trial (on the issue of whether the statutory scheme was intended to apply to Shelton College in view of constitutional considerations and Shelton's singular religious nature). On November 7, 1980, that court held that to subject Shelton to the licensing scheme was so intended. Beyond that, the court went on to rule that such application was not violative of Shelton's Free Exercise and Establishment Clause rights, but that to bar Shelton's calling itself a "College" would violate its First and Fourteenth Amendment rights of free speech. On December 10, 1980, the state court issued a permanent injunction prohibiting Shelton, unless licensed, from awarding any degree, and requiring Shelton to delete all statements in its publications that it would award collegiate degrees, and to insert in all applications for admissions a statement that the state court had prohibited Shelton from awarding degrees unless and until it would be licensed.

The Petitioners noticed appeal to the Appellate Division of the Superior Court of New Jersey on January 16, 1981, but during the pendency of that appeal sought interim injunctive relief from the district court.

The district court, on May 18, 1981, granted the plaintiffs a preliminary injunction prohibiting enforcement of the state court's order until such time as the Supreme Court of New Jersey would construe the statutes and regulations in question. The district court concluded that the federal plaintiffs were likely to prevail on the merits and that the application to them of the regulatory scheme caused them irreparable injury. *New Jersey-Philadelphia Presbytery of Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 514 F.Supp. 506 (D.N.J. 1981) (see Appendix D).

The plaintiffs continued pursuit of the indicated state court determination of statutory construction. On November 17, 1981, the Supreme Court of New Jersey granted direct certification, and on August 9, 1982, held (a) the State's program for licensing institutions of higher

education to be applicable to "sectarian institutions" (not distinguishing Shelton from other religious colleges in New Jersey), (b) facially the program did not unduly interfere with the free exercise of religion or create excessive governmental entanglement with religion. *New Jersey State Board of Higher Education v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982) (see Appendix C). That court modified the Chancery Division injunction to allow the awarding of earned credits and degrees to eligible students to the end of the 1982-83 academic year, and to the class of 1984 through the end of the 1983-84 academic year.

On January 10, 1983, a hearing took place in the district court, the state court trial evidence being made part of the record and each side calling one additional witness. On July 29, 1983, the district court ruled, declining to make its preliminary injunction final. The court concluded that the New Jersey statutes and regulatory scheme as explicated by the New Jersey Supreme Court, were constitutional, noting, however that "It is quite likely that Shelton College will not be able to survive if it is unable to grant baccalaureate degrees." *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, Civil No. 79-3341 (D.N.J. July 29, 1983) (see Appendix B). On September 26, 1983, the order of the district court (Appendix B), reciting that Petitioners were entitled to no declaratory or injunctive relief beyond that awarded in the court's opinion and order dated January 4, 1980 (see Appendix E), dismissed the complaint. On July 17, 1984, the Third Circuit, *per curiam*, affirmed (see Appendix A).

## REASONS FOR GRANTING THE WRIT

The argument often made in certiorari petitions, that the case will have wide impact upon similar parties, cannot be made here. The most basic fact about Shelton is

that it is a unique institution which will cease to exist if the decision below stands. The substantiality of the federal question presented arises from Shelton's *special* character as a ministry vis-á-vis total power in the state to control it. Shelton, because of its strict Calvinist orientation and severe rejection of worldliness, is limited in its drawing power to few young adults, indeed. Its degree, reflecting the institution, will not deceive the public or any prospective employer (as the record amply establishes). Yet Shelton is the free and enthusiastic choice of some young adults, who intensely prefer what they receive at Shelton, as the faith community in which they elect to pursue their higher education. Shelton is an "integral part of the religious mission of the church" (*Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)), that reason being "the only reason for the school's existence." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975). Its teachers believe that they exercise a religious vocation by teaching there. This religious enterprise is now faced with an impossible choice: it must either take a license and subject itself to a pervasive regulatory scheme (and the record well establishes that it can do neither and survive religiously), or it must close its doors.

The irrationality of the forced destruction of this institution — as well as the lack of compelling state interest to justify that — is shown by the fact that petitioners find themselves in the following situation: Shelton may call itself a "college"; Shelton may advertise itself as such; it may present its full curriculum, and it may give credits for every course it offers. It may graduate the students whom it deems to have completed its academic requirements. It may call that certificate by any words in any language — except that it may not call it a "degree". But the awarding of its degree is the requisite condition for its existence as the "college" which it is free to call itself.

The decision below directly contradicts principles established by this Court:

1. The Court of Appeals, acknowledging Shelton to be religious, and in spite of record proof that it is a church institution, treated it as secular. In so doing, the court's analysis and holding are contrary to that of this Court in *Lemon v. Kurtzman, supra, Meek v. Pittenger, supra,* and *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979). Those cases hold that statutes regulating church ministries must be justified by a state interest higher than that required for the regulating of secular organizations. Further, such statutes must not create extensive involvement of government with churches (including — and that was the precise point in *Lemon* — church schools[2]).

2. Here the State failed utterly to meet its burden of proof by "searchingly examining" (*Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972)) the alleged state interest in barring the one thing at issue here: Shelton's award of its degree. The record disproves such a societal interest. Lack of that interest is best summed up in expert testimony given at the trial which establishes that, today, the bachelor's degree is not a single thing, of high and uniform value. One such witness who was asked whether a

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2. In terms of being completely a church entity, Shelton is precisely akin to the parochial schools considered in *Lemon, Meek* and *Catholic Bishop.* It is unique in New Jersey and sharply contrasts with almost all other religiously related colleges today — for example the religious colleges examined by the Court in *Tilton v. Richardson,* 403 U.S. 672 (1971) and *Roemer v. Board of Public Works,* 426 U.S. 736 (1976). These institutions have pursued the recommendations made in W. GELLHORN and R. K. GREENAWALT, AN INDEPENDENT FORDHAM? A CHOICE FOR CATHOLIC HIGHER EDUCATION (unpublished study made available to general public, 1968). This proved to be the flagship study for Catholic and other sectarian colleges in the United States which desired to enter the secular academic mainstream and to participate in governmental funding. It presented a detailed rationale whereby government aid to church-related colleges might be obtained, the essence of which was to essentially secularize the institution. Shelton, to the contrary, remains the thoroughly ecclesial, separatist entity which it has always been and as it is known to its own limited "market".

Bachelor of Science degree of Centenary College, a New Jersey-licensed institution, (which degree is based on horseback riding and stable management skills) and a Drew University Bachelor of Science degree meant the same thing, responded:

> ". . . [C]ertainly the two degrees of Bachelor of Science, side by side, form an absurd contrast."

(Superior Court of New Jersey — Chancery Division, Transcript of July 1, 1980, volume 3, pages 81-82).

Dr. Russell Kirk, an expert witness, testified that there is no agreement among scholars as to the meaning of the bachelor's degree, no universally adopted standard for obtaining it, and no assurance that the possession of such a degree is today proof of quality education.[3] As an

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3. See, *e.g.*, Recent books: BARZUN, J., THE HOUSE OF INTELLECT (1959); BARZUN, J., THE AMERICAN UNIVERSITY (1965); KEATS, J., THE SHEEPSKIN PSYCHOSIS (1965); O'TOOLE, S., CONFESSIONS OF AN AMERICAN SCHOLAR (1970); WAGNER, F., THE END OF EDUCATION (1976); BIRD, C., THE CASE AGAINST COLLEGE (1975); HELLER, L.G., THE DEATH OF THE AMERICAN UNIVERSITY (1973); KLINE, J., WHY THE PROFESSOR CAN'T TEACH MATHEMATICS AND THE DILEMMA OF UNIVERSITY EDUCATION (1977); KIRK, R., DECADENCE AND RENEWAL IN THE HIGHER LEARNING (1979); COPPERMAN, P., THE LITERACY HOAX (1978).

Recent articles: Birnbaum, "Factors Related to University Grade Inflation", *Journal of Higher Education*, Vol. 48, No. 5, September/October, 1977; Craven and Becklin, "Student Access and the Quality of Instruction", 32 *Educational Record*, Winter, 1978; Duplass, "Degree Depreciation: A Fait Accompli for the Liberal Arts Degree", *Liberal Education*, Vol. 62, December, 1976; Edgerton, "Talent for the 1980's — Social Change and the Redefinition of Baccalaureate Education", *Liberal Education*, 1979; Epstein, "Bring Back Elitist Universities", *New York Times Magazine*, February 6, 1977; Harris and Keller, "Assessment Measures Needed for Competency — Based Higher Education", *Peabody Journal of Education*, July, 1976; Hodgkinson, "Education in 1985: A Future History", *Educational Record*, Spring, 1979; Schiefelbein, "Confusion at Hartford: What Makes an 'Educated Man'?", *New York Times Magazine*, April 1, 1978; Winthrop, "How Much Are College Stu-

internationally recognized authority on higher education, he denied that the value of academic degrees is traceable to state regulations:

> "It seems to me that the value of the bachelor's degree to the State comes from the educational institutions themselves, not State regulation that establishes the value of the degree from Princeton, Drew or Rutgers University, and all these degrees from different universities and colleges are judged by employers, by other universities and colleges on their own merits, not upon a notion that there is a standard degree of bachelor ordered by all institutions in New Jersey."

(United States District Court for the District of New Jersey, Transcript of January 10, 1983, pages 14-15).

3. Finally, the ruling of the court below stands for the proposition that government may not merely entangle itself with church ministries, it may completely envelop them. Here New Jersey has required that a small church institution must become part of a "state system" of education and subject itself to licensing as the price of being allowed to give recognition — in the form of a Shelton degree — to credits earned and moral character approved. And licensing depends upon compliance, by the non-tax-aided church entity, with as open-ended a regulatory scheme as can be imagined. The STANDARDS FOR NEW JERSEY INSTITUTIONS OF HIGHER EDUCATION, to which Shelton must conform if it is to issue its degree, substitutes, in lieu of stated standards, blank-check grants of unlimited power to state agents to render totally subjective judgments. Those pow-

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dents Learning Today? — Issues and Trends in American Education", *Peabody Journal of Education*, January, 1978; Zagano, "The Great American Writing Crisis", *The Education Digest*, October, 1977.

ers pertain to every aspect of the life of an institution. The keystone of this archway of vagueness is found in Paragraphs 7 and 8 of the STANDARDS' Forward:

> "7. Because of changes in peer group emphases on the details of good management and in order to permit flexibility in the regulations (and on the part of institutions governed by the regulations), where appropriate, the regulations shall use language such as 'adequate', 'suitable', 'proper', 'desirable' and so forth, to describe the end sought.
>
> "8. Specific interpretations of such words as 'adequate', and so forth, are to be determined by the chancellor and ultimately the Board of Higher Education in accord with existing standards of good peer group practice."[4]

Here is indeed a "regulatory maze . . . wholly lacking in 'terms susceptible of objective measurements'." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604 (1967). Because of its entangling nature, supplanting the dominion of the Church over its discrete ministry with the dominion of the state, the total regulatory scheme is plainly excessively entangling. It calls for governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). It involves "programs, whose very nature is apt to entangle the state in details of administration." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). It calls for "sustained and detailed administrative

4. Lest there be any doubt that the Standards are standardless, Sec. 9:1-1.1 ("Definitions") provides:

> " 'Adequate, appropriate, equivalent, significant, suitable, and sufficient', mean adequate, appropriate, equivalent, significant, suitable and sufficient, respectively, in the judgment of the chancellor or his representative and utlimately the Board of Higher Education."

relationships . . . for the enforcement of statutory or administrative standards." *Id.* at 621.

## CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge that this Petition be granted.

Respectfully, submitted,

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